IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [illegible]

ROBERT C. HUTCHERINGTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

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No.

ROBERT C. HETHERINGTON,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Robert C. Hetherington, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment, conviction and sentence were entered and imposed by the United States District Court for the Northern District of Illinois, Eastern Division, on October 22, 1959, and the motion to vacate sentence and for leave to withdraw the guilty plea was denied on October 23,

1959. They are not reported, but appear in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals for the Seventh Circuit as a part of the record, and transmitted herewith.

No opinion was rendered by the District Court. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed June 22, 1960, and is not yet reported, but is set forth in Petitioner's Appendix hereto (*Infra*, pp. 1A-7A), and in the certified copy of the record.

An additional opinion of the United States Court of Appeals for the Seventh Circuit, denying the suggestion for rehearing *en banc*, was filed on August 3, 1960, and is not yet reported, but is set forth in Petitioner's Appendix hereto (*Infra*, p. 8a), and in the certified copy of the record. The orders denying the petition for rehearing and the suggestion for rehearing *en banc* were filed on August 1, 1960 and are not yet reported, but are set forth in Petitioner's Appendix hereto (*Infra*, pp. 10a-11a), and in the certified copy of the record.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on June 22, 1960. On August 1, 1960, it was ordered that the petition for rehearing be denied. (These orders appear in Petitioner's Appendix hereto (*Infra*, pp. 10a-11a). This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is an affidavit of bias and prejudice filed by the defendant in a criminal prosecution, pursuant to the provisions of Section 144 of Title 28, United States Code, which recites that a trial judge had evidenced a personal bias and prejudice against him, the defendant, and a personal bias and prejudice in favor of the government, and states as his reason for this belief that, during the pendency of motions to dismiss, for discovery and production, and for a bill of particulars, the prosecutor assigned to the case and the special agent who investigated the case, out of the presence of the defendant and his counsel, and without notice to either, met with the judge to whom the case was assigned and discussed the quantum, nature and theory of the government's proof in the case, sufficient to establish that the judge was so personally biased and prejudiced against the defendant and in favor of the plaintiff, the United States of America, as to require him to reassign the case?

2. Does not a timely motion under 28 U.S.C. 144, based on the ground, *inter alia*, that subsequent to, and during, the pendency of a plea of "not guilty", the trial judge, the prosecutor and a government agent, who was the chief prospective prosecution witness, had a secret conference in chambers, without notice to the petitioner or his counsel, wherein the quantum, nature and theory of the government's proof in the case against the defendant, require the trial judge's disqualification as being "presumptively prejudicial"?

3. Was the trial judge deprived of power, right and jurisdiction to proceed further in the case, by reason of the filing of a timely and sufficient affidavit of bias and

prejudice, and the orders, judgment and sentence entered by the judge after the filing of such affidavit of bias and prejudice thereby rendered null and void and of no effect?

4. Is the trial judge's loss of jurisdiction to proceed further in the case, as a result of the filing of a timely and sufficient affidavit of bias and prejudice, waived by the defendant's subsequent withdrawal of his plea of not guilty and his entry in its stead of a plea of guilty?

5. Is a defendant's plea of guilty, entered during the course of his trial, after he had offered evidence of his illness and physical inability to continue with the trial, and expressed the fear that a continuance of the trial might be fatal to him, and after the denial of his motion for a mistrial, on the grounds of illness and his physical inability to continue with the trial, and where he stated to the court at the time of entering his plea of guilty, "Well, I just can't go on with this", a plea of guilty made voluntarily and without coercion?

6. Is there abuse of judicial discretion in denying leave to withdraw a guilty plea, *without hearing*, on defendant's claim that his plea was induced by his bad health and recurring attacks of cardiac illness, which had so weakened the defendant that he did not believe he could endure further participation in the trial by reason of substantial mental disturbance, by reason of the threat and fear that he could not survive the trial, by reason of an irrational impulse caused by mental disturbance and physical fear, and by reason of his belief, from remarks of the trial judge and the prosecutor in off-the-record discussions, as related to him by his counsel, that he would not receive a sentence of imprisonment; and does not such a motion *require* a hearing under the decisions of this Court?

STATUTES INVOLVED

The statute involved herein, 28 U.S.C. 144, provides as follows:

§ 144. *Bias or prejudice of judge.*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Federal Rules of Criminal Procedure, Title 18, United States Code:

Rule 11. Pleas. A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, *and shall not accept the plea without first determining that the plea is made voluntarily* with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. (Emphasis added.)

Rule 32(d), Withdrawal of Plea of Guilty... A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT OF THE CASE.

The petitioner, Robert C. Hetherington, was indicted on March 12, 1959. The indictment charged a wilful and knowing attempt to defeat and evade income taxes for the years 1952, 1953 and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.

The petitioner made a timely motion to disqualify the trial judge, pursuant to 28 U.S.C. 144, on August 27, 1959, which motion was denied on September 8, 1959, and trial proceeded.

During the course of the trial, which commenced on September 8, 1959, the petitioner entered a plea of guilty on September 22, 1959.

On October 22, 1959 the trial judge sentenced the petitioner to one year and a day, and a fine of $10,000.00 was imposed.

The petitioner's motion to suspend sentence and place him on probation or, in the alternative, to grant a stay for such period of time as would permit a determination of his physical condition, was denied. The motion of the petitioner for an order vacating the judgment and sentence was denied. The renewal of the motion of the petitioner for an order by the court to disqualify the trial judge for alleged bias and prejudice, filed on August 27,

1959, was not considered, the trial judge stating that his ruling had been made on September 8, 1959. The motion of the petitioner for an order permitting the withdrawal of his plea of guilty, on the ground that it was involuntarily entered, was denied without hearing. A motion to admit the petitioner to bail was denied. Application for bail made to the United States Court of Appeals for the Seventh Circuit was granted on October 23, 1959 in the amount of $1,000.00.

STATEMENT OF FACTS.

On March 12, 1959, petitioner was indicted in the Northern District of Illinois, Eastern Division, for wilfully attempting to evade and defeat his income tax for the years 1952, 1953 and 1954 (App. 10, 11). Petitioner entered a plea of not guilty on April 3, 1959 (App. 13). After a hearing on motions to dismiss the indictment, for a bill of particulars, and for production of documents, the case was continued for trial until September 8, 1959 (App. 17).

Petitioner, on August 25, 1959, pursuant to the provisions of Section 144 of Title 28, United States Code, moved that the district court judge, to whom the case has been assigned for trial, proceed no further, and that the case be reassigned (App. 15). This motion was accompanied by a timely affidavit of the petitioner and a certificate of counsel of record, as required by Section 144, *supra*. (App. 17-20).

Petitioner's affidavit recited that on May 18, 1959, at a time when his motions to dismiss the indictment, for a bill of particulars, and for production of documents were pending before the trial judge, the government prosecutor and the government's principal witness, the special agent who investigated the case, took with them certain files

and documents relating to the proof in the case, and conferred in chambers with the trial judge, without the petitioner or his counsel being present, and without notice to either of them that such a conference was being held. At this meeting with the trial judge, the quantum, nature and theory of the government's proof in this case was discussed. By reason of the statements in the affidavit concerning this meeting and the matters discussed, the petitioner expressed his belief that the trial judge must be considered to be, and is, prejudiced against the defendant and biased in favor of the government.

Hearing was held on the motion to reassign on September 8, 1959, and forthwith denied, the trial judge holding that the petitioner's affidavit was insufficient on its face (App. 24). On the same day, the case proceeded to trial.

During the course of the trial, and after the government had called some fifty witnesses, out of an estimated total of more than three hundred (App. 147), the petitioner, on September 17, 1959, moved for a continuance because of illness (App. 112), and requested an opportunity for examination by a government doctor (App. 114). Objection to this request was made by the prosecutor (App. 12). In support of this motion, petitioner, a physician, testified under oath that he was suffering from chest pains, caused by a cardiac condition, emphysema or cavitation of the lungs, and that, on the night before and on several recent prior occasions, he had lost consciousness, and feared that he might suffer a coronary infarction, with death a possibility (App. 117-119). Upon the conclusion of petitioner's testimony concerning his physical condition, the trial court, upon objection of the government, again denied his motion for a continuance to afford opportunity for examination by a government physician, without prejudice to the

right and privilege of renewal with additional evidence (App. 144-148). Subsequently, further medical testimony was offered by the petitioner concerning his physical condition (App. 159-197). One witness testified that continuation of the trial would seriously jeopardize petitioner's health (App. 188). The witness also testified that, due to the stress and strain of trial, petitioner would get into serious trouble and perhaps die, although he believed death unlikely as a mathematical or statistical matter (App. 187). The government offered no evidence touching on petitioner's physical condition.

After the offering of this evidence, petitioner moved that a juror be withdrawn and a mistrial declared, on the grounds that continuance of the trial could be fatal (App. 199). This motion was subsequently on the same day denied by the trial court (App. 206).

On September 22, 1959, petitioner moved the court for leave to withdraw his plea of not guilty and enter a plea of *nolo contendere* (App. 207). The trial court refused to entertain the proffered plea of *nolo contendere* (App. 207), whereupon petitioner moved to withdraw his plea of not guilty and enter a plea of guilty (App. 207). The trial judge, after explaining to the petitioner the nature of the charge and the probable penalties that could be imposed, and after ascertaining that petitioner had consulted with counsel, granted leave to withdraw the previously entered plea of not guilty and substitute in its stead a plea of guilty to each of the three counts in the indictment, and entered a judgment of guilty on each of these counts (App. 211). Immediately thereafter, upon being asked by the court if he cared to say anything, petitioner replied, "Well, I just can't go on with this." A pre-sentence investigation was then ordered by the court, and the case was set for

disposition on October 22, 1959 (App. 211). On the date set for disposition, petitioner was sentenced to imprisonment on each count of the indictment for a period of one year and one day, sentences on each of the counts to run concurrently, and was also sentenced to pay fines aggregating $10,000.00, together with the costs of prosecution and to stand committed until the fines were paid (App. 217). Petitioner was then remanded to the custody of the United States Marshal. A stay of execution was immediately moved for and denied (App. 217). Shortly after the imposition of sentence, and while petitioner was in the custody of the United States Marshal, he collapsed. His heart and pulse stopped, and the use of a Pulmotor was required to revive him (App. 219). Simultaneously, petitioner's counsel moved that the court suspend sentence and place petitioner on probation, or in the alternative grant a stay for such period of time as would permit a determination of petitioner's physical condition (App. 218). Immediately after this occurrence, on motion of the government prosecutor, the United States Marshal was empowered and authorized to take the petitioner to a hospital with petitioner to remain in the Marshal's custody (App. 223).

On the following morning, October 23, 1959, the petitioner through his attorney, filed a verified motion to vacate the sentence entered on October 22, 1959, and for withdrawal of his plea of guilty. The grounds for the motion may be briefly stated as:

1. That the defendant was so weakened physically that he entered the plea because he could not endure further participation in trial.

2. That the defendant was mentally disturbed.

3. That he believed he could not survive trial.

4. That the plea was entered on an irrational impulse.

5. That he entered the plea in the belief that he would not be imprisoned, and that belief was induced by remarks and statements of the trial judge and the prosecutor in off-the-record discussions; that he had been told by his attorneys that that was their judgment, based on such discussions and the evidence.

6. That the considerations in sentencing were illegal and that the sentence was motivated and imposed in response to what the trial court considered a personal affront in the filing of the earlier motion to reassign (App. 223).

The motion to vacate sentence and to withdraw the plea of guilty was denied summarily, without the taking of evidence, and without hearing on its allegations (App. 233), by order dated October 23, 1959 (App. 246). On the same day, an appeal was taken to the Court of Appeals for the Seventh Circuit.

The errors relied upon in the Court of Appeals related to the refusal of the trial judge to disqualify himself and reassign the cause, pursuant to a timely motion under Section 144 of Title 28, United States Code; that, by reason of said motion, the trial judge lost jurisdiction; that the plea of guilty was coerced by indisposition, ill-being, and was not freely and voluntarily made; that the court abused its discretion in refusing to vacate the sentence and allow withdrawal of the guilty plea or, in the alternative, in refusing to accord the defendant a hearing on his motion to withdraw the plea; and that the sentence imposed was motivated by unlawful considerations.

On June 22, 1960, the conviction was affirmed. Petition for rehearing was denied on August 1, 1960. A suggestion for rehearing *en banc* was denied on August 1, 1960. The principal grounds for the decision were that the court had jurisdiction of the subject matter and of the defendant, and had the power, upon defendant's voluntary plea of guilty, made with an understanding of the charge, to enter a judgment unassailable from attack. See Petitioner's Appendix hereto (*infra*, pp. 1a-7a).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals, in upholding the trial judge's refusal to recuse, upon the filing of petitioner's affidavit of bias and prejudice, has sanctioned a flagrant disregard of judicial ethics and propriety, calling for the exercise of this Court's power of supervision.

Under 28 U.S.C. 144, upon the filing of a timely and sufficient affidavit that the trial judge has a personal bias or prejudice for an adverse party or against affiant, the judge "shall proceed no further" in the case, and another judge must be assigned. Such an affidavit must "state the facts and reasons for the belief that bias or prejudice exists", and these must be sufficient to support the conclusion that bias and prejudice do exist. However, the facts stated in the affidavit must be taken as true, and cannot be controverted. *Berger* v. *United States*, 255 U.S. 22 (1921). Since they are incontrovertible, the facts stated in the affidavit are as conclusive upon the court as if they had been judicially determined to be true. Upon the filing of a timely affidavit, the only question it presents for judicial determination is whether or not its allegations, assuming them true, are sufficient to show bias or prejudice, *Berger* v. *United States*, *supra*, and thus to require the judge to disqualify himself. In the case at bar, the Court of Appeals has refused to rule on the sufficiency of the affidavit, and thus has failed to censure the clearly prejudicial misconduct of the judge alleged in the affidavit.

The affidavit now under consideration states that the trial judge was personally prejudiced against petitioner and personally biased in favor of the government, and

states in substance, as a reason for such bias and prejudice that, during the pendency before him of certain pre-trial motions in the case, the trial judge, without any notice to petitioner or his attorney of record, held a conference in his chambers with the Assistant United States Attorney assigned to try the case and the special agent of the Internal Revenue Service who was in charge of the government's investigation of this tax fraud case, and who was the principal government witness in the case, and that said special agent carried into the conference files and documents pertinent to the case, and that, at this conference between the trial judge, the Assistant United States Attorney and the special agent, matters relative to the quantum, nature and theory of the government's proof were discussed (App. 17-20).

The duty of a judge regarding *ex parte* communications of this character is epitomized in Canon 17 of the Canons of Judicial Ethics of the American Bar Association, which reads as follows:

> 17. *Ex parte* Communications.
>
> A judge should not permit private interviews, arguments, or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.
>
> While the conditions under which briefs of arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

The conference held by the trial judge in the case at bar is clearly repugnant to Canon 17. Such private, *ex parte* communications by the prosecutor and his chief witness, involving the nature, quantum and theory of the government's proof, could not be more clearly designed to affect judicial action. Where such a conference is held without notice to the defense, the conclusion is well-nigh irresistible that the prosecution intends it to be prejudicial; otherwise, notice, so easy to give, would be given to the accused. A trial judge who countenances such extensive *ex parte* communications and so permits himself to be exposed to one side of the case leaves himself open to the inference that he was either prejudiced *ab initio* or has become prejudiced by virtue of hearing the government's case *ex parte*.

II.

The ex parte discussion between the trial judge, the prosecutor and the government's principal prospective witness, the agent who investigated the case concerning the quantum, nature and theory of the government's proof was presumptively prejudicial, requiring disqualification of the judge to proceed further upon the filing of a timely affidavit.

In a separate opinion in *Smith* v. *United States*, 360 U.S. 1 (1959), where the record disclosed that, before the accused pleaded guilty, an F.B.I. agent called upon the trial judge in his chambers and talked at some length about the accused's background and connection with the crime charged, out of the presence of the accused or anyone representing him, three Justices of this Court were of opinion that, even though the contact was not covertly made, "In a criminal case, such a private conference must be deemed presumptively prejudicial where, in violation of Fed. Rules

Crim. Proc., 32(c) (1), it was conducted prior to the plea", and that the supervisory power of this Court required reversal. 360 U.S. at 17-18. (The majority of the Court reversed the conviction on another ground and did not reach the issue.)

A defendant, pleading guilty, "is entitled to have the judge before whom he stands . . . act in the case with complete judicial detachment, uninfluenced by conferences in chambers with agents of the prosecution." *Smith* v. *United States*, 238 F.2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F.2d 347 (5 Cir., 1957); see also *United States* v. *Christakos*, 83 F.Supp. 521, 525 (N.D. Ala., 1949).

It is submitted that, in putting its stamp of approval on an *ex parte* conference involving so clear a violation of judicial propriety, the Court of Appeals has sanctioned a denial of the due process of law, guaranteed by the Fifth Amendment, and also a departure from the accepted and usual course of judicial proceedings, warranting the exercise of this Court's power of supervision.

III.

In holding that a judge's improper failure to recuse himself under 28 U.S.C. 144 is a mere non-jurisdictional error, the Court of Appeals has come into conflict with the decisions of courts of appeals for other circuits.

In *Connelly* v. *United States District Court*, 191 F.2d 692, 696 (9 Cir., 1951), the Ninth Circuit held that a sufficient affidavit of prejudice deprived the respondent judge of the jurisdiction to hear and determine any issue, of bail or otherwise, affecting the affiant, and granted a writ of prohibition "ordering the respondent judge to take no action in any matter affecting petitioner respecting his contentions regarding bail or in connection with his

prosecution under the above indictment . . .", 191 F.2d at 697. In *Stringer* v. *United States*, 233 F. 2d 947 (9 Cir., 1956), where a judge voluntarily disqualified himself for cause (not pursuant to 28 U.S.C. 144), his later resumption of control of the case was held incurable error, despite appellant's acquiescence in it. And in *Carroll* v. *Zerbst*, 76 F. 2d 961 (10 Cir., 1935), the Tenth Circuit, while holding that an affidavit of prejudice does not deprive the *court* of jurisdiction, says in dictum that the affidavit "merely affected the power of the judge against whom it was directed to proceed further with the case. It was directed against Judge Soper. The plea of guilty was entered before Judge Coleman . . . and he imposed the sentence." 76 F. 2d at 962. The implication is clear that if the disqualified judge had proceeded, as in the case at bar, to accept a plea of guilty and impose sentence, he would have been acting beyond his power or jurisdiction.

And in *Minnesota and Ontario Paper Co.* v. *Molyneaux*, 70 F. 2d 545 (8 Cir., 1934), the Eighth Circuit, referring to the case presented by an affidavit of prejudice directed against the trial judge in a receivership proceeding, indicated at p. 547 that it involved a question of the trial judge's jurisdiction to make orders regarding the receivership.

It would be in the public interest for this Court to resolve the conflict created by this case with the other circuits as to whether a judge's improper refusal to disqualify himself, in the face of an imperative statutory command, deprives him of jurisdiction to proceed further.

The decision of the Court of Appeals further conflicts with applicable decisions of this Court. In *Berger* v. *United States*, 255 U.S. 22 (1921), in which a trial judge erroneously refused to recuse himself, this Court ob-

served that, upon the filing of a sufficient affidavit of prejudice, it is the judge's duty to "proceed no further" in the case (255 U.S. at 35), and held that, while the judge had the right to pass on the sufficiency of the affidavit, he "had no lawful right or *power* to preside as judge on the trial of defendants upon the indictment.", 255 U.S. at 36; emphasis supplied. "Power" in this context means "jurisdiction", for "jurisdiction" is the power of a court or judge to entertain a proceeding. See 23 Words and Phrases, 361 *et seq.* and cases there cited, and *Bouvier's Law Dictionary*, Third Revision, "Jurisdiction". In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), an affidavit of prejudice is referred to as "the affidavit objecting to his [the recused judge's] further exercise of jurisdiction", 230 U.S. at 43.

Where the judge is disqualified by a sufficient affidavit of prejudice, it is submitted that the court is incomplete. As in those cases where an accused is deprived of counsel, the incomplete court no longer has jurisdiction to proceed. See *Johnson* v. *Zerbst*, 304 U.S. 458, 467-468 (1938), where counsel was neither furnished nor waived. Also, in *Wm. Cramp & Sons S. & E. B. Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), in which a district judge, who had rendered a *pro forma* decree in the district court, improperly sat on the Circuit Court of Appeals and heard the case on appeal, in violation of a statutory disqualification, the court "was virtually no court at all, because not organized in conformity to law." 228 U.S. at 652. That this principle is equally applicable where a judge, on the filing of a sufficient affidavit of prejudice, refuses to recuse himself, is made clear in many state cases, as, for example, *In re Woodside-Florence Irrigation District*, 121 Mont. 346, 194 P. 2d 241 (1948), in which

the state court held that, where a sufficient affidavit of prejudice had been filed, the trial judge who proceeded to hear the case had no jurisdiction and the proceedings before him were *coram non judice* and void, notwithstanding the attempt by the affiant to waive the disqualification by withdrawing the affidavit.

IV.

Whether a plea of guilty operates as a waiver of a judge's erroneous refusal to recuse himself, upon the filing by a defendant of a timely and sufficient affidavit of prejudice, is an important question of federal criminal law.

While petitioner submits that the answer is implicit in *Berger* v. *United States*, 255 U.S. 22, 35-36 (1921), and *Ex parte American Steel Barrel Co.*, 230 U.S. 35, 43 (1913), this Court has never passed on the precise question of whether a plea of guilty operates as a waiver of a judge's erroneous refusal to recuse himself, upon the filing by the defendant of a timely and sufficient affidavit of prejudice. Especially in view of every defendant's right, even upon pleading guilty, "to have the judge before whom he stands . . . act in the case with complete judicial detachment. . . .", *Smith* v. *United States*, 238 F. 2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F. 2d 347 (5 Cir., 1957). This is an important question of federal law, which should be settled by this Court.

In upholding a plea of guilty before, and sentence by, a judge against whom a timely and sufficient affidavit of prejudice had been filed, the Court of Appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings. The exigency of the statute is clear and unmistakable: The judge against whom an affidavit of prejudice is filed "shall proceed no further" in the proceeding, 28 U.S.C. 144, and in fact is without power or jurisdiction to proceed further, as is

demonstrated elsewhere in this petition. Even a defendant pleading guilty is entitled to do so before an unbiased judge, both on authority, *Smith* v. *United States*, 238 F. 2d 925, 931 (5 Cir., 1956), *rehearing denied*, 240 F. 2d 347 (5 Cir., 1957), and on reason. The proper procedure, where a timely and sufficient affidavit of prejudice has been filed and the accused decides to plead guilty, is outlined in *Carroll* v. *Zerbst*, 76 F. 2d 961, 962 (10 Cir., 1935), a *habeas corpus* case, in which it is noted that, while Carroll had filed an affidavit of prejudice against Judge Soper, he pleaded guilty before another judge, who imposed sentence. There is perhaps no time when an accused person is more in need of an unbiased judge than when he pleads guilty and becomes subject to that judge's virtually unreviewable discretion to deprive him of life or liberty. Under the practice now sanctioned by the Court of Appeals, a judge who would be disqualified by reason of bias from presiding at the trial of an accused may nevertheless accept his plea of guilty and sentence him to death or imprisonment. It is submitted that the Court of Appeals has thereby sanctioned a practice which offends the Fifth Amendment's guarantee of due process of law, and is such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Korer v. *Hoffman*, 212 F. 2d 211 (7 Cir., 1954) concerned a petition for mandamus brought in the Court of Appeals for the Seventh Circuit, directing the same judge involved in the case at bar to disqualify himself because of his personal bias and prejudice. The Court of Appeals denied the petition, on the ground that the petitioner had an adequate remedy "to obtain redress from a reviewing court on an appeal from any final judgment which may be entered against him." 212 F. 2d at 213. The

Court equated the refusal of a trial judge to disqualify with his refusal to dismiss a complaint for failure to state a cause of action, or to dismiss an indictment for failure to charge a criminal offense, saying, at page 213, that, "In all three instances a reviewing court, upon appeal from a final adverse judgment, would be presented with a legal question and a decision in either instance favorable [sic] to the aggrieved party would require a reversal." In obedience and adherence to that decision, this petitioner did not petition the Court of Appeals for immediate and extraordinary relief, upon the denial of the motion to disqualify. Nor could he have done so! The trial judge prevented this by immediately placing the defendant on trial when he was advised of the possibility of resort to an extraordinary remedy.

One of the judges of the Court of Appeals for the Seventh Circuit, in denying petitioner's suggestion for a rehearing *en banc*, detailed the time elements involved from the time of the plea of not guilty to the time of the entry of the guilty plea, and stated, "Whether the defendant had a right to require the trial judge to disqualify is another question." The essence of the separate opinion is that petitioner waited too long for redress: that, somehow or other, petitioner should have prevented his being put on trial. These expressions are irreconcilable with the same court's decision in *Korer* v. *Hoffman*, 212 F. 2d 211 (7 Cir., 1954), discussed above. See also *Goldberg* v. *Hoffman*, 226 F. 2d 681 (7 Cir., 1955). It appears that petitioner is being penalized for doing what, under the existing law of the circuit, he was obliged to do.

This, too, is a proper circumstance for exercise of the supervisory jurisdiction of this Court over inferior courts.

V.

The Court of Appeals' characterization of petitioner's plea as being voluntary is not supported by the record, and calls for the exercise of the power of supervision of this Court.

It was clearly demonstrated during the trial that petitioner was physically unable to continue with the trial and fearful that continuing would be fatal to him (App. 118-119). The testimony of petitioner, a physician, under oath, concerning his physical condition, was bolstered by another physician, a specialist in internal medicine, who expressed the opinion that continuance of the trial could cause petitioner's death, although statistically unlikely (App. 187), but would severely jeopardize his health (App. 188). Despite the failure of the government to offer any testimony to refute the evidence, and the objection of government counsel to having petitioner examined by government doctors, the trial judge denied petitioner's motion for a mistrial. The denial of this motion confronted petitioner with a fearful dilemma, and left him with the alternatives of either risking his health, and even his life, to establish his innocence, or bringing his ordeal to an end by a plea of guilty. That the latter alternative prompted his plea of guilty is evidenced by his statement to the court, made contemporaneously with his plea, "*Well, I just can't go on with this.*" (App. 211).

It is earnestly urged that petitioner's plea of guilty was not voluntary, and the trial judge's acceptance of the plea under these circumstances violated the clear mandate of Rule 11 of the Federal Rules of Criminal Procedure.

The fact that the trial judge explained the nature of the charge to petitioner, ascertained that he had consulted with his lawyer, advised him of the possible penalties that might be imposed, ascertained that no one connected with

the government or any of his lawyers had assured him that any special form or kind of punishment would be interposed (App. 208-211), completely failed to establish that the plea was voluntary. On the contrary, all of the circumstances concerning this question clearly establish that petitioner's plea of guilty was coerced by reason of illness, and his fear that going forward with the trial would jeopardize his health and life.

In *Waley* v. *Johnson*, 316 U.S. 101, 104 (1942), this Court enunciated the principle that a plea of guilty coerced by a federal law enforcement officer was no more consistent with due process than a conviction supported by a coerced confession. It is submitted that this ruling is equally applicable to a plea coerced by fear of death.

A coerced plea of guilty would be clearly subject to collateral attack. *Waley* v. *Johnson*, 316 U.S. 101, 104 (1942). *A fortiori*, it is therefore available on direct appeal.

VI.

In light of the events which occurred during the trial and the sworn allegation of counsel in the petitioner's motion to withdraw his plea of guilty, the trial court's denial of this motion without hearing was an abuse of judicial discretion.

Rule 32(d) of the Federal Rules of Criminal Procedure provides that, to correct manifest injustice, the court, after sentence, may set aside the conviction and permit the defendant to withdraw his plea. The granting of an application to withdraw a plea of guilty after sentence is discretionary with the court. An order denying the application, however, is reviewable on appeal for abuse of discretion. *United States* v. *Mack*, 249 F. 2d 421, 423 (7 Cir., 1957). Under the circumstances of this case, it

is submitted that the trial judge's summary denial of petitioner's motion to withdraw his plea of guilty constituted a clear abuse of discretion. This Court has held that, on timely application, the trial court should vacate a plea of guilty shown to have been unfairly obtained, or given through ignorance, *fear* or inadvertence. *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927). See also *United States* v. *Lias*, 173 F. 2d 685, 688-689 (4 Cir., 1949).

Petitioner alleged in his motion, sworn to by counsel, to vacate sentence and for withdrawal of plea of guilty, that his decision to enter the plea of guilty was induced by fear of death and made upon an irrational impulse caused by mental disturbance and physical fear, and was also induced by remarks and statements of the trial judge and the prosecutor, in chambers, during off-the-record discussions during the trial, as related by his counsel, which impelled the belief that he would not receive a sentence of imprisonment, if he would agree to enter a plea of guilty, and that this was the opinion of his counsel, based on the events, conversations and the evidence.

Certainly, a hearing on these allegations was required. *Norman* v. *United States*, 276 F. 2d 377 (9 Cir., 1960). None was accorded. In this regard, the affirmance of the order of the district court, denying the motion without hearing, must be interpreted as a holding that, assuming the truth of the allegations, it was not sufficient in law to merit granting the relief asked. In this, the decision of the Court of Appeals for the Seventh Circuit is in direct conflict with the decision of the Fourth Circuit in *United States* v. *Lias*, 173 F. 2d 685 (4 Cir., 1949), holding that a defendant should properly be allowed to withdraw his guilty plea if, as a result of what the judge has said;

the defendant was misled into pleading guilty, under the belief he would receive probation.

Conviction upon a coerced plea of guilty, and the imposition of sentence thereon, constituted a denial of the due process of law guaranteed by the Fifth Amendment. *Euziere* v. *United States*, 249 F. 2d 293, 294-295 (10 Cir., 1957). The trial court's summary denial, *without hearing*, of the motion to vacate sentence and permit withdrawal of the plea of guilty constituted a manifest abuse of discretion, and a departure from the accepted and usual course of judicial proceedings, calling for the exercise of this Court's power of supervision.

On the subject of whether or not a hearing is *required* on the claim of petitioner that physical weakness, mental disturbance, irrationality, and the fear that continuing with the trial would cause his death, caused him to enter a plea of guilty, the conflict exists between this case and the decision of this Court in *Dandridge* v. *United States*, 356 U.S. 259 (1958) and *Dusky* v. *United States*, 362 U.S. 402 (1960); the opinion of the Ninth Circuit in *Norman* v. *United States*, 276 F. 2d 377 (9 Cir., 1960), and the opinion of the Court of Appeals for the District of Columbia in *Gearhart* v. *United States*, 272 F. 2d 439 (D.C. Cir., 1959).

The situation here is closely related to the circumstances before this Court in *Dandridge* v. *United States*, *supra*, where the defendant claimed he was in such pain that he pleaded guilty. The decision here is in direct conflict with this Court's holding in that case. It is also in direct conflict with the holding of this Court in *Dusky* v. *United States*, *supra*, the holding of the Court of Appeals for the District of Columbia in *Gearhart* v. *United States*, *supra*, and the holding of the Ninth Circuit in *Norman* v. *United States*, *supra*, that the trial courts in-

volved did not have a sufficient basis on which to make a ruling of competency to stand trial, and that the holding against the respective defendants was not justified by the record.

CONCLUSION.

The decision below is erroneous, and out of harmony with rulings of this Court and other courts of appeals. It sanctions departures from the usual and accepted course of judicial procedure which are sufficient to warrant the exercise of this Court's power of supervision over the administration of justice in the federal courts. The writ of certiorari should be granted.

Respectfully submitted,

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PETITIONER'S APPENDIX.

In The

UNITED STATES COURT OF APPEALS.

For The Seventh Circuit.

SEPTEMBER TERM, 1959—APRIL SESSION, 1960.

No. 12811

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT C. HETHERINGTON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 22, 1960.

Before HASTINGS, *Chief Judge*, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* The defendant Robert C. Hetherington was indicted on March 12, 1959 for attempted evasion of his individual income taxes for the calendar years 1952, 1953 and 1954, in violation of Section 145 (b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954.

On April 3, 1959 defendant entered a plea of not guilty and was given until May 4, 1959 to file motions. Motions were made to dismiss the indictment, for discovery and production, and a bill of particulars, all of which were disposed of on June 17, 1959. The defendant made a timely motion accompanied by an affidavit pursuant to Section

144 of Title 28, United States Code, that Julius J. Hoffman, the judge to whom the trial was assigned, proceed no further, and that the cause be reassigned. The principal recitation of the affidavit stated that during the pendency of certain motions on May 18, 1959, the prosecutor and the Government's principal witness had a conference in Judge Hoffman's chambers at which time the theory of the Government's case was discussed. The affidavit further stated that the defendant was not present, nor given any notice that this meeting was to occur. On the basis of this affidavit the defendant expressed his belief that the Judge must be considered to be personally biased in favor of the plaintiff, the United States of America.

After motions made by defendant's counsel had been disposed of the case was set for trial on September 8, 1959 before the Honorable Julius J. Hoffman. Trial was commenced on September 8, 1959 and the Government proceeded with presenting its evidence until September 22, 1959, at which time the defendant moved to withdraw his plea of not guilty and enter a plea of guilty. Said motion was granted and the defendant entered his plea of guilty, and on October 22, 1959 the trial judge sentenced the defendant to one year and a day and a fine of $10,000.00 was imposed.

On October 23, 1959 defendant filed a motion to vacate the sentence and for withdrawal of his plea of guilty, which was denied.

The contested issues are:

1. Whether a plea of guilty was voluntarily entered by the defendant after consulting with, and upon the advice of counsel.

2. Whether this is the proper forum and time for review of the lower court's failure to reassign.

3. Whether a sufficient showing was made to empower the trial court to entertain a motion to withdraw the plea of guilty made by defense counsel after sentence was imposed.

4. Whether the ruling of the trial court upon the motion for continuance and for the withdrawal of a juror raises jurisdictional questions not waived by the entry of a guilty plea.

5. Whether the sentence imposed was legal and within the discretion of the trial court.

The defendant Robert C. Hetherington was a practicing physician and surgeon in Geneva, Illinois. On March 12, 1959 he was indicted. The indictment was in three counts, alleging that the joint returns filed by he and his wife, Leola, were false and fraudulent, in that the said defendant did thereby attempt to defeat and evade a large part of the income tax due to the United States of America. The years involved were 1952, 1953 and 1954. The total evasion charged for the three years was $14,820.48 on a total additional income of $38,853.62. The Government intended to prove its case on the "net worth" theory.

On September 8, 1959 the motion for reassignment was heard and denied by the court who expressed the opinion that the supporting affidavit was insufficient to justify the granting thereof. Defendant's counsel then asked for a continuance stating that he had not had sufficient time to prepare the case for trial. This motion was denied and the case proceeded to trial.

After selection of the jury and making opening statements on behalf of the Government and the defendant, the Government on September 10, 1959 began the introduction of evidence and the case continued on trial daily until September 22, 1959 when the defendant moved to withdraw his plea of not guilty and enter a plea of guilty. On September 14, 1959 at the request of the Government a conference was had in chambers to discuss problems created by the necessity of subpoenaing numerous witnesses for the production of documents. The court was informed by defendant's counsel that he would have to hold the Government to the rule requiring strict proof. At the same conference Mr. Calihan, defendant's counsel, ad-

vised the court that he had a genuine fear that the defendant would destroy himself, and also requested that the court adjourn at 4:45 P.M. each day in order that the defendant might get back to Geneva and carry on his practice in the evening. Judge Hoffman indicated that he would not relieve the Government of its difficulties arising from the nature of the case and the volume of its exhibits and witnesses, and in this conference he further advised counsel he would try to accede to his request regarding adjournments. On September 15, 1959, the trial was again interrupted by a conference in the chambers and Mr. Calihan acknowledged that the Government's counsel had consulted with the Department of Justice and that the Government would not make a recommendation to the trial court with reference to the type of disposition which might be made upon a plea of guilty. Mr. Calihan then attempted to obtain a commitment from Judge Hoffman as to what the sentence might be and it is very clear from Judge Hoffman's remarks that he would not make any arrangements in advance with the defendant as to what the sentence might be. The court went into great detail telling counsel for defendant that he would not make any deal as to what the sentence might be.

On September 17 certain representations were made that the defendant had fallen the previous evening injuring his leg. There were other medical representations made, one of which was a report from Mayo Clinic, but that opinion indicated that the doctor was in shape to proceed to trial and advise with his counsel.

Again on September 17 at the conclusion of the morning session the defense counsel raised the question of the defendant's health. Judge Hoffman then advised defense counsel as follows:

> "I will be glad to give you a hearing outside of the presence of the jury with respect to the alleged or asserted medical condition of the defendant at any time you move for it."

During the afternoon session of September 17 the defendant took the stand in his own behalf to support his contention as to his physical condition and outlined his medical history. At the conclusion of the defendant's testimony the court denied defendant's motion for a continuance to permit a physical examination of the defendant by a Government doctor.

Again on September 21 the case was interrupted to permit the defendant to offer further evidence in support of his physical condition. Dr. Rodney Nelson and Dr. Thomas A. Heenahan were called as witnesses for the defense. Dr. Nelson stated that it was his opinion that it was unlikely that the defendant would become seriously ill or die because of the stress and strain of the trial, but that the continuation of the trial would seriously jeopardize the health of the defendant. Dr. Heenahan stated that he had no opinion as to the effect of the trial on the health of the defendant. At the conclusion of the testimony of Dr. Heenahan the defendant moved to withdraw a juror and to declare a mistrial. This motion was denied.

Then on September 22, 1959 the defendant asked to withdraw his plea of not guilty and to enter a plea of nolo contendere which was denied. Then the defendant moved for leave to withdraw his plea of not guilty and to enter a plea of guilty and the Court explained to the defendant in the presence of his attorney the charges in the indictment, and the defendant was asked if he knew the nature of the charges. The defendant answered "Yes, Sir." The Court then explained the possible penalty upon the plea of guilty and the defendant said he understood the consequence of such a plea.

On October 22, 1959 the case came on for disposition on the plea of guilty. The defendant was given a chance to say whatever he desired in his own behalf. The Court after having studied the pre-sentence report, and hearing the defendant, sentenced him to one year and one day in the penitentiary and assessed a fine of $10,000.00.

On October 23, 1959 the defense counsel filed a motion to vacate the sentence and for withdrawal of the plea of guilty. The trial court heard at length the arguments of counsel for the defendant; and at the conclusion of the arguments denied the motion.

There is considerable evidence in the record as to the defendant's physical condition during the trial and at the time of the defendant's plea of guilty, however, we are of the opinion that it is clear that the defendant voluntarily entered his plea of guilty with full understanding of the nature of the charges made in the indictment, his available defenses and the nature and consequences of such plea. The record shows that the defendant was represented by able counsel. The record further discloses that he was admonished at great length as to the consequencets of a plea of guilty. The plea of not guilty was not withdrawn and a plea of guilty entered until the case had been on trial for two weeks, and not until defendant's counsel had exhausted many possible avenues for change of venue, a continuance, or a commitment by the court as to a sentence the defendant might receive. We are of the opinion there is no merit to the contention that the defendant was coerced or did not know the consequences of his plea of guilty.

The court having jurisdiction of the subject matter and of the defendant had the power upon defendant's voluntary plea of guilty made with an understanding of the nature of the charge to enter a judgment unassailable from attack. A plea of guilty admits all essential allegations, thus relieving the Government of the burden of making proof and a court having jurisdiction of the subject matter and of the defendant has power to enter a judgment, unassailable by collateral attack, on a guilty plea without conducting an independent inquiry or hearing to determine so-called jurisdictional facts. *United States* v. *Hoyland*, 264 F. 2d 342, 352. It is our opinion that a voluntary plea of guilty constitutes an effective and complete waiver of all non-jurisdictional defects which

might be otherwise raised by way of defense, appeal or collateral attack. *Weir* v. *United States*: 92 F. 2d 634, 635.

It has been held many times that an Assistant United States Attorney may confer with the Trial Judge even though it is out of the presence of the defendant without grounding an inference of improper scheming against the right of defendant to a fair and impartial trial. *Craven* v. *United States* (C.C.A. 1), 22 F. 2d 605, 606, 607. In any event the trial court's denial of the motion to reassign the case does not, even if erroneous, raise a jurisdictional question.

The proposition that a sentence within the statutory maximum provided for by Congress is not subject to review on appeal except possibly for manifest abuse of discretion is well established. In the instant case the sentence although possibly unexpected by the defendant was not beyond the maximum limitations provided in applicable statutes.

Therefore we hold that the sentence imposed was legal and within the discretion of the District Court. It did not err in refusing to vacate the sentence or permit withdrawal of the plea.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago 10, Illinois

Wednesday, June 22, 1960

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT C. HETHERINGTON, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 12811

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

No. 12811

SCHNACKENBERG, *Circuit Judge*.

Defendant seeks a rehearing in this court and suggests that the rehearing be held *en banc*.

Among the grounds urged for a rehearing is defendant's assertion that this court has not decided whether defendant's affidavit of bias was sufficient to require the district judge's disqualification.

The record shows the following relevant facts:

1959

April 3 Plea of not guilty entered.

May 18 Alleged conference held in trial judge's chambers, without notice to defendant or his attorney of record, where assistant United States attorney assigned to trial of defendant's case, and special agent Ralph A. Weber conferred with trial judge; that said Weber had conferences with defendant therefore and was to be the principal witness against him; at said conference matters relating to the quantum, nature and theory of the government's proof in this cause were discussed; that trial judge has evidenced a personal bias and prejudice against defendant.

June 17 Order setting case for trial Sept. 8, 1959.

August 25 Affidavit of defendant in support of his motion that trial judge reassign case, pursuant to 28 U.S.C.A. § 144, supported by affidavit of defendant setting forth, *inter alia*, facts set forth, *supra*, alleged to have occurred on May 18, 1959.

September 8 Order denying defendant's motion to reassign case, etc. Trial started.

" 22 By leave of court defendant withdrew plea of not guilty, and, upon arraignment, pleaded guilty on counts 1, 2 and 3. Judgment of guilty entered.

We have no situation which suggests that the court was without jurisdiction in these proceedings. Whether the defendant had a right to require the trial judge to disqualify himself is another question. In his brief in this court his counsel contends, erroneously, I think, that this court has not ruled on whether his affidavit of bias was sufficient to require the court's disqualification. It is not necessary for me to consider what position I would have taken as to this affidavit if I had been a member of the panel which decided this case. I am limited to voting upon the suggestion of a rehearing *en banc*. For that purpose I have examined the affidavit with great care. Unfortunately for defendant, whose affidavit it is, I note a significant omission in the recital of facts. The affidavit fails to show when he first learned of the conference in chambers which he relies upon as the basis for his motion to transfer from the trial judge. However the affidavit, which was made on August 25, 1959, reveals that at or before that date he had knowledge of the facts charged therein. It follows, therefore, that he knew these facts on September 8, 1959 when his motion to transfer the case was denied and the trial started. It was not until September 22 that he interrupted the trial by withdrawing his plea of not guilty and pleaded guilty whereupon the judgment appealed from was entered.

It is apparent that with knowledge of the alleged facts he withheld action until the evidence at the trial developed unfavorably to him. If the court erred in denying his motion for transfer of the case, he waived that error by entering a plea of guilty, and he is now in no position to complain of the court's action in that respect.

I have therefore voted to deny his suggestion for a rehearing *en banc*.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, August 1, 1966

Before

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12811 vs.	
ROBERT C. HETHERINGTON, Defendant-Appellant.	

It Is Ordered by the Court that the petition for a rehearing *en banc* of this cause be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, August 1, 1960

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,		Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12811	vs.	
ROBERT C. HETHERINGTON, Defendant-Appellant.		

It is ordered that the petition for a rehearing of this cause be, and the same is hereby, DENIED.